

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CONSTITUTION ALTERATION (FAIR ELECTIONS) BILL 1988

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Hon Lionel Bowen MP)

OUTLINE OF BILL

1. The main purposes of this Bill are to amend the Constitution -

- . to provide for fair elections for the House of Representatives, the State Parliaments and legislatures of the mainland Territories, based on the principle of 'one vote, one value' but subject to permissible limited variations in the numbers of electors in each electorate in each State or Territory; and
- . to confer the right to vote in Commonwealth, State and mainland Territory elections on all Australian citizens over the age of 18, subject to certain qualifications.

2. The Bill inserts in the Constitution a new Chapter VIA entitled 'Fair Elections' -

- . to provide for the fair determination of electoral divisions for elections for the House of Representatives, State Parliaments and legislatures of the mainland Territories;
- . to prohibit multiple voting; and
- . to guarantee to Australian citizens over the age of 18 the right to vote in elections subject to certain qualifications.

3. The Bill makes several related and consequential alterations to the Constitution.

4. The Bill omits sections 25 and 41 of the Constitution.

5. The amendments to the Constitution made by the Bill commence on the day on which the Bill receives the Royal Assent, but the provisions of Chapter VIA concerning fair elections and the right to vote do not apply to an election held within the first year after that commencement.

NOTES ON INDIVIDUAL CLAUSESClause 1: Short titleClause 2: Commencement

6. This clause provides for the provisions of the Bill to commence on the day on which it receives the Royal Assent.

Clause 3: Qualification of electors

7. This clause substitutes a new section 8 for existing section 8 of the Constitution. The existing section provides that the qualification of electors for the Senate in a State shall be that prescribed by the Constitution or by the Commonwealth Parliament as the qualification of electors of members of the House of Representatives. It also provides that each elector may vote only once in a Senate election. The new section 8 extends to electors in Senate elections in Territories as well as States. It provides for the qualification of electors of senators in each State or Territory to be the same as that prescribed by the Commonwealth Parliament as the qualification of electors of members of the House of Representatives.

8. New section 8 is expressed to be subject to the Constitution. It will therefore be subject to new section 124G relating to the right to vote.

9. The provision in the existing section 8 prohibiting plural voting is included in new section 124H.

Clause 4: Provision as to races disqualified from voting

10. This clause omits section 25 of the Constitution. Section 25 provides that where all people of a particular race are excluded from voting in elections for the lower House of

the Parliament of a State, the people of that race in that State are not to be counted for the purpose of determining under section 24 of the Constitution the number of members of the House of Representatives in that State. Section 25 has no practical operation now as all relevant State discriminatory laws have been repealed. Moreover, discriminatory laws of the kind contemplated by section 25 are contrary to Australia's international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.

Clause 5: Electoral divisions and Qualification of electors

11. This clause substitutes new sections 29 and 30 for the existing sections 29 and 30 of the Constitution.
12. Existing section 29 provides that, until the Commonwealth Parliament otherwise provides, a State Parliament may determine the electoral divisions in that State for elections for the House of Representatives and the number of members to be elected in each division. To that extent the operation of the section is effectively spent. The section also provides that a division shall not be formed out of parts of different States. It also provides that in the absence of other provision each State shall be one electorate.
13. New subsection 29(1) empowers the Commonwealth Parliament to make laws providing for electoral divisions for the House of Representatives and fixing the number of members to be chosen for each division. The subsection is expressed to be subject to the Constitution. It will therefore be subject to new Chapter VIA relating to fair elections.
14. New subsection 29(2) requires that the same number of members be chosen for each division of a particular State.
15. New subsection 29(3) continues the provision of existing section 29 that a division cannot be formed out of parts of different States.

16. New subsection 29(4) recognises that electoral divisions may be formed out of combinations of Territories, parts of Territories or both.

17. Existing section 30 provides that, until the Commonwealth Parliament otherwise provides, the qualification of electors of members of the House of Representatives in a State shall be the same as for elections for the lower House of the Parliament of that State. It also provides that each elector may vote only once in a House of Representatives election.

18. New section 30 empowers the Commonwealth Parliament to prescribe the qualification of electors of members of the House of Representatives in each State or Territory. The section is expressed to be subject to the Constitution. It will therefore be subject to new section 124G relating to the right to vote.

19. The provision in the existing section 30 prohibiting plural voting is included in new section 124H.

Clause 6: Right of electors of States

20. This clause omits section 41 of the Constitution.

Section 41 provides that no adult person who has or acquires a right to vote at an election for a State lower House may, while that right exists, be prevented by any Commonwealth law from voting in a Senate or House of Representatives election. The operation of section 41 is effectively spent. In The Queen v. Pearson; Ex parte Sipka (1983) 152 C.L.R. 254, the High Court held that the right to vote protected by section 41 must have been possessed by a person under a State law in 1902 when the federal franchise was originally established.

Clause 7: Election of State Parliaments

21. This clause inserts a new provision, section 107A, in the Constitution.

22. Subsection 107A(1) states the general rule that members of a House of the Parliament of a State must be chosen directly by popular vote. It therefore precludes a method such as election or nomination by the Parliament or Executive Government of the State or by an electoral college. However, the filling of casual vacancies is governed by new section 124E.

23. Subsection 107A(2) allows State Parliaments to prescribe the qualification of electors of members of a House of the Parliament of a State. The subsection is expressed to be subject to the Constitution. It will therefore be subject to new section 124G relating to the right to vote.

Clause 8: Election of certain Territory legislatures

24. This clause inserts a new provision, section 122A, in the Constitution.

25. Subsection 122A(1) states the general rule that members of a legislature of a mainland Territory, or of a combination of such Territories, must be chosen directly by popular vote. However, the filling of casual vacancies is governed by new section 124E.

26. Subsection 122A(2) allows a Territory law, subject to any law of the Commonwealth Parliament, to prescribe the qualification of electors of members of a Territory legislature. The subsection is expressed to be subject to the Constitution. It will therefore be subject to new section 124G relating to the right to vote.

Clause 9: Chapter VIA - Fair elections

27. This clause inserts a new Chapter VIA - 'FAIR ELECTIONS' - in the Constitution. It comprises new sections 124A - 124H.

Section 124A: Interpretation

28. The terms 'election', 'electoral region' and 'fair distribution', used in Chapter VIA, are defined in this section. Chapter VIA is to apply to elections for the House of Representatives, for each House of a State Parliament, and for the legislatures of mainland Territories and its provisions on plural voting and right to vote apply also to Senate elections. For the purposes of the Chapter an electoral region is a State or Territory, or an area comprising two or more areas each of which is a Territory or part of a Territory. This permits, for instance, the inclusion of the Australian Capital Territory and the Jervis Bay Territory in the one electoral region. A fair distribution is defined as a distribution in accordance with new section 124B.

Section 124B: Fair distributions of electoral divisions

29. This section sets out the requirements that a determination of electoral divisions in an electoral region must satisfy in order to constitute a fair distribution. The number of electors in each division in an electoral region must be a number not more than 10% above or below the average number of electors in the divisions in that electoral region, multiplied by the number of members to be chosen for the division.

30. Subsection 124B(3) deems a redistribution to be a fair distribution if no proceedings challenging it have been instituted within the 40-day period referred to in subsection 124F(2), or if all proceedings so instituted have been withdrawn or dismissed. The purpose of this subsection is to give finality to a redistribution, so that an election may be confidently held on new boundaries if there has been no challenge to the redistribution within the period of 40 days, or if any such challenge has been withdrawn or dismissed.



Section 124C: Elections in divisions

31. The effect of new section 124C is as follows:

- (a) a fair redistribution must take place after the commencement of Chapter VIA before an election in divisions can be held, except in the case of an election held within the first year after that commencement - paragraph 124C(1)(a) and subsection 124C(4);
- (b) an election in divisions cannot be held more than 7 years after the last fair redistribution - paragraph 124C(1)(a); and
- (c) an election in divisions cannot be held if, on the last day of each of 2 successive months since the last fair redistribution in an electoral region, the numbers of electors in more than one-third of the divisions in that region diverge by more than the permissible 10% above or below the number of electors calculated in accordance with subsection 124B(2), unless, broadly speaking, the terms of service of all or any of the members of the relevant legislative chamber are due to expire by effluxion of time within 6 months from the last day of the 2 successive months in question - subsection 124C(3).

An election in divisions held otherwise than in accordance with section 124C would be invalid.

Section 124D: Elections where electoral region to be one electorate

32. This section provides for the case where an election in an electoral region is not to be held in electoral divisions or

where such an election, if held in electoral divisions, is or would be contrary to section 124C. Subsection 124D(1) provides that the electoral region shall then be one electorate. For example, in the case of an election for choosing members of the House of Representatives, the section requires that any State in which the electoral divisions fail to comply with the relevant requirements shall be one electorate. In the case of an election for choosing members of a House of the Parliament of a State the section requires that the State shall be one electorate if the electoral divisions fail to comply with the relevant requirements.

33. Subsection 124D(2) provides for the method of election where an electoral region is to be one electorate. In the case of an election for the House of Representatives, the method is to be such as the Commonwealth Parliament provides. In the case of an election for a State Parliament or Territory legislature, the method is to be such as is determined in accordance with the law of the State or Territory or Territories concerned or, in the absence of such a law, as is provided by the Commonwealth Parliament. In any case, however, the method shall be as nearly as practicable the same as the method of choosing senators. Thus the Senate election system is to apply in a case where a State or Territory is to be treated as a single electorate because of the failure of a redistribution to conform to the requirements of a fair distribution. The direct application of the Senate method of election would cause practical difficulties, so that section 124D enables the Commonwealth or State Parliament or the Territory legislature, as the case may be, to make the necessary modifications. If a State Parliament or Territory legislature fails to do so, then the Commonwealth Parliament may legislate for that State, Territory or Territories. An election at large held otherwise than in accordance with section 124D would be invalid.

Section 124E: Casual vacancies

34. This section allows for the filling of a casual vacancy in a State Parliament or Territory legislature in the manner provided by the State Parliament concerned or, subject to any law made by the Commonwealth Parliament, by the Territory legislature concerned. Casual vacancies in the Senate are filled as provided in section 15 of the Constitution or, in the case of senators for a Territory, as provided by the Commonwealth Parliament. Casual vacancies in the House of Representatives are filled by a by-election in accordance with sections 24 and 33 of the Constitution.

Section 124F: Right to challenge determinations of electoral divisions

35. This section gives an elector the right to challenge a determination of electoral divisions on the ground that the determination was not a fair distribution. Under subsection 124F(2) proceedings challenging a determination may not be instituted after the end of 40 days after public notification of both the results of the determination and all statistics necessary to ascertain whether or not the determination was a fair distribution.

Section 124G: Right to vote

36. This section is a general provision conferring a constitutional right to vote in a House of Representatives, State or Territory election as that term is defined in section 124A. It also applies to Senate elections by virtue of new section 8.

37. The effect of subsection 124G(1) is that, subject only to 2 exceptions, the right to vote extends to each Australian citizen who complies with reasonable conditions prescribed by the applicable Commonwealth, State or Territory laws as to

residence and enrolment and who has reached the age of 18 years. The exceptions are any disqualification prescribed by the applicable laws as to persons who, because of unsoundness of mind, are incapable of understanding the nature and significance of enrolment and voting, and persons who are undergoing imprisonment for an offence. Subsection 124G(1) lays down a minimum requirement. It merely indicates the persons who have a constitutional right to vote; it does not preclude other persons from being permitted to vote.

38. Subsection 124G(2) provides for judicial enforcement of the constitutional right to vote.

39. Subsection 124G(3) provides that section 124G does not apply in relation to an election held within the first year after the commencement of Chapter VIA.

Section 124H: Electors to have only one vote

40. This section prohibits plural voting by electors in the choosing of senators, members of the House of Representatives, members of a House of the Parliament of a State, or members of the legislature of a mainland Territory, or of a combination of such Territories.







